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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 267

ARLIE MITCHELL and JAMES ROGERS,
Petitioners,

v.

MALVERN GRAVEL COMPANY,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of Arkansas.

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In Opposition to Petition for Writ of Certiorari to the Supreme Court of Arkansas.

STATEMENT OF THE CASE.

Petitioners were employees of Respondent, Malvern Gravel Company, and were injured in the course of their employment on May 10, 1962. Both Petitioners were covered under the Arkansas Workmen's Compensation Act and immediately began drawing workmen's compensation benefits and medical expenses under the terms of the Workmen's Compensation Act. At the time of the trial in November, 1963, Petitioner Mitchell had received $2,730.00 in compensation and approximately $4,950.00 in medical expenses, and Petitioner Rogers had received

$2,730.00 in compensation and approximately $7,900.00 in medical expenses (R. 9; 27; 93).[1]

Petitioners sued the Missouri Pacific Railroad Company in the Arkansas State Circuit Court alleging grounds of common law negligence against the Missouri Pacific Railroad Company, in that this company furnished an unsafe car for them to work on (R. 9; 10; 11; 27).

The Missouri Pacific Railroad Company, in turn, filed a Third Party Complaint against Respondent, Malvern Gravel Company, and the Malvern and Ouachita River Railroad Company, alleging that Malvern and Ouachita River Railroad Company and Respondent Malvern Gravel Company were common carriers in interstate commerce under the terms of the Federal Employers' Liability Act and praying judgment over against the two companies either by way of indemnity or contribution among joint tort feasors (R. 12; 13; 14).

At this point, Petitioners, by amendment to their Complaints, adopted the allegations of the Third Party Complaint of Missouri Pacific Railroad Company and for the first time alleged that they came under the Federal Employers' Liability Act (R. 19; 27).

The trial court, after overruling Motions for directed verdict by Respondent, submitted to the jury the following Interrogatory: "Number 1: Do you find from a preponderance of the evidence that Malvern Gravel Company was at the time of the accident a common carrier by rail engaged in interstate commerce for hire?", to which the jury answered: "Yes" (R. 101; 112).

The trial court sustained a motion for directed verdict by the Malvern and Ouachita River Railroad Company

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[1] Record citations herein are to the abstract of record, filed in the Arkansas Supreme Court, ten copies of which were filed in this Court by Petitioners.

and dismissed it from the action (R. 99). Petitioners did not appeal this ruling (App. 2a).[2]

The Supreme Court of Arkansas reversed the trial court holding that there was no substantial evidence in the record that Respondent operated as a railroad as a means of carrying for the public and that there was no substantial evidence that Respondent operated as a common carrier within the meaning of the Federal Employers' Liability Act (App. 8a).

Respondent respectfully submits that the decision of the Arkansas Supreme Court was correct and that the Petition for Writ of Certiorari should not be granted.

REASONS FOR REFUSING THE WRIT.

I.

This Court has held, in Wells Fargo & Co. v. Taylor, 254 U. S. 175, 187-188, that: "In our opinion the words 'common carrier by railroad,' as used in the Act [the FELA] **means one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier.** This view not only is in accord with the ordinary acceptation of the words, but is enforced by mention of cars, engines, track, roadbed, and other property pertaining to a going railroad. . . ." (Emphasis added.)

The Supreme Court of Arkansas, in applying this definition, held in this case that the Malvern and Ouachita River Railroad Company had never operated as "a going railroad" and that Respondent has never held itself out as a common carrier and, with the exception of a few friendly acts to help some neighbors without compensa-

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[2] References to Appendix, refer to Appendix A to Petition for Writ of Certiorari.

tion, has used the railroad facilities only for its own products (App. 4a).

As stated by Petitioners, "the question presented is important to all industrial concerns maintaining railroad facilities" in that, unless the Supreme Court of Arkansas is sustained, such concerns may find themselves confronted with ruinous claims without adequate protection even though they have fully complied with the Workmen's Compensation Acts of the states in which they operate.

In Kach v. Monesson Southwestern Railway Company, 151 F. 2d 400 (3d Cir. 1945), cited by Petitioners, the facts were entirely different. The status of the railway company as a common carrier was admitted and indeed could not be challenged, since it was a chartered railroad company, a separate corporation, handling goods of others for hire.

The Supreme Court of Arkansas properly relied upon Duffy v. Armco Steel Corp., 225 F. Supp. 737 (1964); Tilson v. Ford Motor Co., 130 F. Supp. 676 (1955); and, particularly, Kelly v. General Electric Co., 110 F. Supp. 4, affirmed 204 F. 2d 692, Certiorari denied 346 U. S. 886, to be discussed hereafter.

II.

Admittedly, this Court has been concerned in preserving to litigants their Constitutionally guaranteed right to a jury trial. However, the cases relied upon by Petitioners to justify a review of this case under the Federal Employers' Liability Act deal exclusively with questions of negligence which are clearly triable to a jury.

Petitioners have cited no case holding that the determination on undisputed evidence, of a legal relationship such as the application of the term "common carrier" is a jury question.

On the contrary, the lower federal courts have consistently considered the application of the term "common carrier" to be a matter of law to be decided by the court. Duffy v. Armco Steel Corp., 225 F. Supp. 737 (1964); Tilson v. Ford Motor Co., 130 F. Supp. 676 (1955). This Court denied certiorari and refused to review Kelly v. General Electric Co., 110 F. Supp. 4, 204 F. 2d 692, Certiorari denied 346 U. S. 886, a case in which the Defendant, General Electric Company, was declared not to be a common carrier as a matter of law on facts strikingly similar to the facts in this case.

The issue of whether or not Respondent was a common carrier should never have been submitted to the jury and was properly decided in Respondent's favor as a matter of law by the Supreme Court of Arkansas.

III.

Petitioners attempt to "pierce the corporate veil" and to demonstrate that Respondent and the Malvern and Ouachita River Railroad Company are one and the same. The Supreme Court of Arkansas refused to do this and stated that even if the two companies were declared to be one for the purposes of this case, Petitioners would not be helped (App. 6a).

The Malvern and Ouachita River Railroad Company is a separate corporation owning a railroad right of way and one engine, all of which it leases to Respondent for $2,500.00 a year, its sole income. It has no employees and performs no railroad operations. It has never at any time hauled freight or passengers for hire nor is there any evidence that demand has been made upon it to haul freight or passengers for hire (R. 43-49). By no stretch of the imagination can Malvern and Ouachita River Railroad Company be considered a common carrier.

The factual situation in Eddings v. Collins Pine Company, 140 F. Supp. 622, is entirely different from this case in that the pine company deliberately decided to enter into a common carrier operation and organized a wholly owned subsidiary for this purpose which applied for and received a certificate of public convenience and necessity to operate as a common carrier. This situation does not exist in this case.

IV.

As set out above, it is the position of Respondent that the determination of its status as a common carrier is a matter of law to be determined by the court and not a matter to be submitted to the jury.

The facts, as determined by the Supreme Court of Arkansas, and supported by the record, are that Respondent moves its own products from its plant to a point where they can be delivered to the mainlines of the Missouri Pacific Railroad Company and Rock Island Railroad Company; that it has never held itself out as a common carrier; that it has never carried passengers for hire or otherwise; that it has no freight nor passenger station; that it has no tariff schedule; that it does not participate in freight charges of other railroads; that it has never hauled freight for hire for anyone nor held itself out as willing to do so (R. 43-49).

The only evidence which Petitioners can find in the record to support their theory that Respondent is a common carrier is the fact that Respondent hauled its own products on its own property to a contractor's batch plant located on Respondent's property; that it assisted local farmers by unloading a car of lime for them, without charge; that it unloaded three cars of lime for the batch plant contractor in 1957, without charge; that it assisted the Missouri Pacific Railroad Company by unloading cer-

tain cars of steel beams, which Missouri Pacific was not equipped to unload, again without charge; and that it assisted the Malvern Public School System by unloading two cars of cinders for construction of a high school track, without charge (R. 48-49; 66; 74; 95-98).

It is significant that all of the cars unloaded by Respondent were billed to Malvern, Arkansas, and were not consigned either to Respondent or Malvern and Ouachita River Railroad Company, and that according to testimony of Petitioners' witness, Horace Nutt, General Clerk for the Missouri Pacific Railroad Company, the cars were simply carried into the plant of Malvern Gravel Company to be unloaded because "it had a bucket down there to unload and we didn't. . . . All of this was merely an accommodation on the part of Malvern Gravel Company in order that the cars could be unloaded" (R. 97-98). Surely Respondent cannot be charged with the liability which Petitioners seek to impose for simple acts of accommodation to some of its neighbors.

Petitioners further stress the fact that Respondent received $5.00 per car for switching services from Rock Island Railroad Company. This payment was made for cars loaded with Respondent's own products pursuant to an order of the Arkansas Commerce Commission that a railroad company (Rock Island Railroad Company) must do the switching or pay the customer for doing it. This payment did not constitute part of the transportation charges. The other railroad serving Respondent, Missouri Pacific Railroad Company, did its own switching in lieu of making the payment (App. 5a).

It is true that the Malvern Gravel Company tracks were used by the Malvern Brick & Tile Company under an agreement for joint maintenance for the portion of the track used by Malvern Brick & Tile Company. However, Malvern Brick & Tile Company owned its own engine

and hauled its own cars with its own products and Malvern Gravel Company did not haul for Malvern Brick & Tile Company (R. 48).

Petitioners state that Respondent could not prove any instance where it refused use of its facilities to any individuals or corporations. Respondent had no duty to prove any such thing. On the contrary, the burden was on the Petitioners to prove that Respondent was a common carrier under the Federal Employers' Liability Act. Despite Petitioners' statements at page 18 of the Petition, there is absolutely no proof in the record that the public had the right to demand service of Respondent as a common carrier and there is no proof that the public did demand service of Respondent.

The Arkansas Supreme Court has determined on the evidence submitted that Respondent is not a common carrier. The Arkansas Court has consistently held that determination of the status as a common carier is a matter of law to be determined by the Court. Dodson v. Clark County Lumber Company, 123 Ark. 50, 184 S. W. 417; Valley Lumber Company v. Westmoreland Brothers, 159 Ark. 484, 252 S. W. 609; Edgar Lumber Company v. Cornie Stave Company, 95 Ark. 449, 130 S. W. 452; Jones v. Ferguson, 181 Ark. 522, 27 S. W. 2d 96. The holdings of the Arkansas Court are consistent with federal decisions on this question.

In Duffy v. Armco Steel Corp., 225 F. Supp. 737 (1964), the defendant owned and operated railroad facilities serving its plant and other plants it owned in the same area over leased rights of way. Its locomotive transported cars delivered by a common carrier within and between the plants. The District Court observed that the railroad facilities owned and operated by Armco had not been used to transport the goods of others and that Armco had not offered their use to the public. The Court declared as a

matter of law on motion for summary judgment, that Armco was not a common carrier.

In Tilson v. Ford Motor Company, 130 F. Supp. 676 (1955), Ford conducted railroad operations within and beyond its Rouge plant area. It did not hold itself out to serve the public and had no facilities for serving the public. The Court, in holding as a matter of law that Ford was not a common carrier, stated that definitions of the words "common carrier":

> ". . . invariably include the concept of one holding himself out to the public as engaged in the business of carrying persons or things for hire. The common carrier offers its services indiscriminately to the public for compensation."

In Kelly v. General Electric Company, 110 F. Supp. 4, affirmed 204 F. 2d 692, certiorari denied 346 U. S. 886, General Electric, at its Philadelphia plant, had a system of internal trackage, two switching engines, nine specially constructed cars which it rented to rail carriers for the transportation of its products and ten other cars used for the housing and exhibition of its products. A portion of General Electric's trackage had been constructed by it in the bed of a public highway. Under a written agreement with the Pennsylvania Railroad, General Electric Company agreed that the construction, maintenance and operation of its tracks should conform to I. C. C. and state commission rules. The Pennsylvania Railroad delivered cars to General Electric where they were picked up by General Electric's engines and moved around the plant. Occasionally, Pennsylvania Railroad delivered cars containing less than carload shipments for General Electric, the remainder of the car containing freight going to other industries. General Electric would then pick up these cars and move them to various places in its plant where its own freight was removed and the cars

were then returned for delivery by the Pennsylvania Railroad to the other consignees.

On these facts, the District Court dismissed the Complaint as a matter of law, stating:

> "A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed. 9 Am. Jur. 430, 431, and cases there cited."

The Court of Appeals for the Tenth Circuit affirmed, stating that it was in complete agreement with the opinion of the District Court and this Court denied certiorari.

An analysis of the facts in this case shows that Respondent at no time held itself out to the public as engaged in the business of transportation of persons or property for compensation that it did not undertake to carry for all people indifferently; that it at no time has been paid for carrier service; and that, as decided by the Supreme Court of Arkansas, the public had no right to demand service from it, nor did the public ever demand service from it.

Petitioners' argument depends primarily upon attempting to establish that Respondent's status as a common carrier was a subject for determination by a jury. In support of this proposition, Petitioners rely only upon the many cases decided by this Court holding that the questions of negligence and of sufficiency of the evidence to establish negligence are proper questions for the jury and that Appellate

Courts should not substitute their judgment for the judgment of the jury on these issues. These cases have no application to the issue presented in this case.

Not only are Petitioners covered by the Arkansas Workmen's Compensation Act, which has provided them substantial compensation in the past and which will provide them additional compensation in the future, but Petitioners have also received a very substantial judgment against the Missouri Pacific Railroad Company, which has been settled.

Respondent submits that the Supreme Court of Arkansas was correct in this case and respectfully prays that this Court deny the Petition For Writ of Certiorari.

CONCLUSION.

Wherefore, Respondent prays that the Petition For Writ of Certiorari be denied.

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